(1)

CASE NO. 92-504

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

TERM: October, 1991

KENNETH EDWARD HOLLAND,
Petitioner,

v.

THE COMMONWEALTH
OF VIRGINIA, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Kenneth Edward Holland
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Virginia Beach, VA 23464
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Petitioner - Pro se

QUESTIONS PRESENTED

1) Whether a claimant for Workers' Compensation was deprived of any constitutionally protected interest, sufficient under any state of facts to assert a cause of action under 42 U.S.C.A. Section 1983, when statutory penalty was imposed upon him which required that he submit to an intravenous radioactive injection to regain entitlement to suspended Workers' Compensation benefits, where claimant refused to submit to the injection without the benefit of informed consent, in light of the manufacturer's printed warnings indicating that long term studies had not been performed to evaluate carcinogenic potential or possible effects on fertility and reproductive capacity inherent in the substance to be injected into the claimant?

2) Whether the District Court erred, by dismissing complaint of pro se plaintiff pursuant to Rules 12(b)(1) and 12(b)(6) of Federal Rules of Civil Procedure, on holding that plaintiff was not deprived of any constitutionally protected interest, was not entitled to any relief under 42 U.S.C. Section 1983, and by refusing to rule on plaintiff's timely filed motion to amend his complaint pursuant to F.R.C.P. Rule 15, in light of certain evidence and testimony which was submitted before that court to alledge such a deprivation?

LIST OF ALL PARTIES

I hereby certify that the following comprises all interested parties known to the Petitioner:

KENNETH EDWARD HOLLAND,

Petitioner,

CERTAIN UNNAMED OFFICERS OF THE COMMONWEALTH OF VIRGINIA, and/or

CERTAIN UNNAMED OFFICERS OF THE INDUSTRIAL COMMISSION OF VIRGINIA,

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VIRGINIA BRIDGE & STRUCTURES, INC., and LIBERTY MUTUAL INSURANCE COMPANY,

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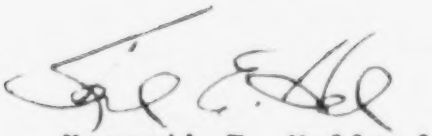
Norfolk, Virginia;

JAMES D. DILLON, M.D., COMMONWEALTH NEUROSURGERY, LTD.,

Attorney: Robert W. Hardy, Esq.,
Knight, Dudley, Dezern, & Clark
Norfolk, Virginia;

Respondents.



Kenneth E. Holland
Petitioner

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OFFICIAL COURT OPINIONS

The United States District Court for the Eastern District of Virginia issued an Order signed April 22, 1991, summarily dismissing the petitioner's claim against the defendants improperly named as "The Commonwealth of Virginia, et al" (sic), and "The Industrial Commission of Virginia, et al" (sic), under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and subsequent to hearing on May 16, 1991 issued an Order signed May 16, 1991, dismissing the claim against the remaining defendants also under Federal Rules 12(b)(1) and 12(b)(6).

The United States Court of Appeals for the Fourth Circuit affirmed the Opinions of the District Court on February 21, 1992, and subsequently denied rehearing on March 20, 1992.

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is sought from a final order of the United States Court of Appeals for the Fourth Circuit, issued February 21, 1992, and its denial of rehearing issued March 20, 1992, and is herein filed within the required ninety (90) day period.

This Court has jurisdiction pursuant to U.S. Const. Art. VI, Section 2, U.S. Const. Amend. 14, Section 1, and 42 U.S.C.A. Section 1983.

CONSTITUTIONAL PROVISIONS & STATUTES

U.S. CONST. Art. VI, Section 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. CONST. Amend. XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Section 1983:

"Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner is a disabled construction worker whose Workers' Compensation benefits were suspended for two years time pursuant to a Virginia statutory penalty invoked by his employer's insurance carrier and sanctioned by the Industrial Commission of Virginia upon his refusal to submit to an intravenous radioactive injection during the course of his medical treatment for an industrial injury. After prevailing in appeals to the Virginia Appellate Courts, petitioner filed suit in federal court for redress of deprivation of 14th Amendment rights under 42 U.S.C. Section 1983.

FACTS

Petitioner suffered serious injury to his lower back on March 25, 1988, for which an award for medical and wage compensation was entered on June 20, 1988. He was treated by an orthopedic surgeon, John M.

Morina, M.D., who from an MRI Scan, determined that he had suffered a ruptured lumbar disc. As a result of certain complaints which could have been caused by neuro impingement, Dr. Morina asked petitioner to see respondent Dr. James D. Dillon, M.D., concerning possible need for decompressive diskectomy and laminectomy.

Dr. Dillon examined the petitioner on May 25, 1988, and scheduled two test procedures for June 9, 1988 at the Diagnostic Center of Virginia Beach General Hospital.

When the petitioner arrived at the hospital, it was revealed to him that one of the procedures, involved the intravenous injection of a radioactive isotope. He then requested additional information concerning the injection from the medical technologist who was to administer it. He was given an enclosure from the

manufacturer of the substance involved containing warnings and precautions stating the following:

Under the heading of "PRECAUTIONS":

"Technetium Tc 99m Mendronate as well as other radioactive drugs must be handled with care * * * to minimize radiation exposure to the patients consistent with proper patient management."

"To minimize radiation dose to the bladder, the patients should be encouraged to drink fluids and void immediately before the examination and as often thereafter as possible for the next 4 to 6 hours."

"No long term animal studies have been performed to evaluate carcinogenic potential or whether Technetium Tc 99m Mendronate affects fertility in males or females."

"Animal reproductive studies have not been conducted with Technetium Tc 99m Mendronate. It is also not known whether Technetium Tc 99m Mendronate can cause fetal harm * * * or can affect reproduction capacity."

Under the heading, "CONTRAINDICATIONS":

"None Known". (Emphasis added)

Under the heading, "WARNINGS":

"This class of compound is known to complex cations such as calcium. Particular caution should be used with patients who

have, or who may be predisposed to, hypocalcemia."

Under the heading, "CLINICAL PHARMACOLOGY":

"Localized areas of abnormal accumulation of the radiopharmaceutical may occur in * * * physiological states involving increased * * * metabolic activity."

Upon review of this information, petitioner asked that the test be postponed pending further consultation with Dr. Dillon concerning the procedure's risks, and possible alternatives. He then went on to submit to an X-ray exam as scheduled, and left the hospital to await contact by Dr. Dillon, upon instruction to do so by Dr. Dillon's nurse or secretary via telephone.

Dr. Dillon subsequently failed to contact the petitioner, refused his requested consultation regarding the test, cancelled his return appointment of June 15, 1988 on the morning of that date

without prior notification, referred the petitioner back to Dr. Morina for further treatment, and at the same time, but without petitioner's knowledge, issued written notice to "Workmen's Compensation", C/O respondent Liberty Mutual Insurance Co., stating that the petitioner had "refused" medical treatment.

On July 21, 1988, Liberty Mutual filed an Application for Hearing with the Industrial Commission of Virginia, based upon the June 15th report of Dr. Dillon, suspending the compensation award pending review by the Industrial Commission.

In the mean time the petitioner had been accepting further medical services from Dr. Morina, who ordered him to remain out of work "indefinitely".

Formal hearing was scheduled for October 04, 1988. Prior to that hearing, the petitioner was unable to secure proper

counsel, and was forced to defend his case pro se. The hearing was held, as scheduled, before Deputy Commissioner Robert E. Dely, in Norfolk, Virginia. On October 21, 1988, the Deputy Commissioner rendered his opinion, and officially suspended the petitioner's compensation award upon his decision that the petitioner's concerns over the radioactive injection were:

"exaggerated and unreasonable, and did not and do not warrant his refusal to undergo the prescribed testing."

Petitioner then filed for a review by the Full Industrial Commission on November 09, 1988, including extensive written arguments. No oral arguments were allowed. As at the formal hearing before the Deputy Commissioner, the petitioner repeatedly claimed that he was well within his "basic legal rights" to refuse the procedure in question, and made reference to sworn

affidavits submitted by hospital personnel, describing, and supporting his actions there in question. On January 31, 1989 the Full Commission affirmed the opinion of the Deputy "in its entirety", and stated that the petitioner's benefits could be restored only if he:

"cure(d) his unjustified refusal of the necessary medical service prescribed".

An appeal was taken to the Virginia Court of Appeals on April 21, 1989, and on August 28, 1989, petitioner filed a "Motion to Allow Additional Damages", requesting a separate proceeding before the Va. Court of Appeals to address a claim for damages pursuant to 42 U.S.C.A. Section 1983, however, no such proceeding was granted, apparently due to his inadvertant failure to properly initiate such a proceeding in the lower courts under Part 3 of the Rules of the Supreme Court of Virginia. Said motion was simply denied, and the Va. Court

of Appeals limited its review to the sufficiency of the evidence submitted to the Industrial Commission.

On August 14, 1990, the Court of Appeals of Virginia overturned the decisions of the Industrial Commission, and ordered that the petitioner's compensation award be restored. On September 12, 1990, the respondent employer and insurer appealed that reversal to the Supreme Court of Virginia, which prolonged litigation until that court eventually upheld the ruling of the Virginia Court of Appeals.

Following issuance of the Mandate in that case, the respondent insurer failed to timely restore the petitioner's award. Further action was then necessarily taken by the Industrial Commission at petitioner's request, and the respondent insurer was subsequently penalized for nonpayment of the appealed award.

The petitioner suffered many consequential injuries as a result of those litigations which included not only physical pain, but also financial hardship, social embarrassment, domestic discord, and mental and emotional strain as well. This period was extremely taxing, and although he inevitably prevailed in his efforts, the amount of stress he had to endure led to a deterioration of his physical and emotional condition, causing a concurrent disintegration of his social and family life. During that period, the petitioner and his wife suffered near total estrangement, and on several occaisions seriously contemplated divorce. Their infant child, now only five years old, was also affected, and has since been suspended from day care, and referred by her pediatrician to a child psycologist for treatment of serious emotional problems.

On January 31, 1991, the petitioner sought to invoke his supplementary remedy for deprivation of protected rights under 42 U.S.C. Section 1983 in the U.S. District Court by filing suit based upon the above stated facts.

All named respondents filed motions to dismiss pursuant to F.R.C.P. Rules 12(b)(1), and 12(b)(6). State respondents alledged immunity from suit as no proper person was named as defendant in the portion of the complaint regarding them, and the private respondents alledged that no state action whatsoever was involved in their activities. On March 05, 1991, petitioner filed a motion to amend pursuant to F.R.C.P. Rule 15, in order to effect a proper pleading of his case, and followed with separate replies to each motion to dismiss, wherein the following points, among many others, were raised:

1) That every competent person has a constitutionally protected liberty interest in refusing unwanted medical treatments.

2) That the January 31, 1989 ruling of the Industrial Commission of Virginia was the primary action causing the deprivation of his fundamental rights by mandating that the petitioner submit to a relatively untested radioactive injection.

3) That the state, or its officers, and the private parties to this action were joint participants in the challenged activity.

4) That the state, or its officers should not be immune from suit when they abuse their authority under the law, and when the relief sought is declaratory or injunctive relief.

5) Claims should not be dismissed where amendment could cure any defect.

The District Judge refused to rule on the motion to amend, and summarily dismissed petitioner's claim against the state respondents on April 22, 1991. A hearing was held on the remaining motions on May 16, 1991, and the District Court issued an Order granting dismissal of the claim against the remaining parties on that date. Petitioner appealed to U.S. Court of Appeals for the Fourth Circuit, where petitioner asserted that the District Court had erred in dismissing the complaint on grounds that a cognizable claim could be possible through amendment to the original complaint. Oral argument was not allowed, and on February 21, 1992, the Court of Appeals affirmed the decision of the District Court, stating only that the case was without merit. Rehearing was denied on March 20, 1992.

ARGUMENT

The petitioner herein respectfully submits that the District Court erred in dismissing his complaint against the various respondents named, or intended to be named, in this action, and that a review of the record in this case will reveal that the decision rendered by the District Court, and upheld by the U.S. Court of Appeals is in conflict with applicable decisions of this Honorable Court, the Fourteenth Amendment to the U.S. Constitution, and further, serves to frustrate the intent of Congress in regard to 42 U.S.C. Section 1983. Petitioner therefore requests that the Court grant this petition for the following reasons:

"A competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." U.S.C.A. Const. Amend 14.

"Civil Rights Act of 1871 was passed for express purpose of enforcing provisions of the Fourteenth Amendment." U.S.C.A. Const. Amend. 14; 42 U.S.C.A. Section 1983.

"Because our notions of liberty are inextricably entwined with our idea of physical freedom and self determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause. * * * Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment * * * ." Cruzan v. Director, Missouri Dept. of Health, 110 S.Ct. 2841, 2856-2857 (1990).

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without

his patient's consent commits an assault, for which he is liable in damages." *Id.* at 2847, Quoting: Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914).

"The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." Cruzan v. Director, Missouri Dept. of Health, 110 S.Ct. 2841, 2847 (1990).

The Fourteenth Amendment states, in part, that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. 14 (Emphasis added)

The activity which the petitioner has consistently challenged is the January 31, 1989 opinion of the Full Industrial Commission of Virginia, which officially enforced upon him a statutory penalty that he submits could have only been effected through blatant disregard and/or denial of his constitutionally protected rights to liberty, equal protection of the law, and substantive due process.

"Substantive Due Process refers to certain actions that government may not engage in, no matter how many procedural safeguards it employs." U.S.C.A. Const. Amend. 14.

Said penalty was imposed under the provisions and authority of Virginia Code Section 65.1-88, where it is provided that only unjustified refusal of medical treatment would mandate the termination of Workers' Compensation benefits, e.g. in the

case of Stump v. Norfolk Shipbuilding & Drydock Corp., 48 S.E.2d 209 (1948).

"(E)ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." Rep. Garfield, Cong.Globe, 42nd Cong., 1st Sess., App. 153.

Although the petitioner admits that Virginia Code Section 65.1-88 does not appear to be unconstitutional on its face, he asks this Honorable Court to take Judicial Notice of the fact that there are certain instances, as was the case here, where the statute may be unconstitutionally enforced. As was stated in his earlier pleadings, the petitioner does not here challenge any part of the Virginia statute in question as it applies to a reasonable

requirement that a claimant for Workers' Compensation benefits seek and accept medical care generally, but as to specific treatments, or on occaision, modes of care recieved, he submits that his inalienable rights to liberty, and self determination, in themselves, should certainly give him due justification to both actively and decisively participate in such treatment, as a proper part of proper medical care.

Respondents Virginia Bridge & Structures, Inc. (employer), and Liberty Mutual Insurance Company (insurer) jointly occupy the position of a fiduciary benefactor in regard to their relationship to the petitioner, in that they are compelled by a duty under contractual agreements to abide by the provisions of the Virginia Workers' Compensation Act, and to provide medical and other compensations to the petitioner, pursuant to an award

entered by the Industrial Commission of Virginia under Virginia Code Section 65.1.

It is under the provisions of that Act, that the State of Virginia grants the employer/insurer the privilege to summarily discontinue compensation in the event that a claimant should, <u>without justification</u>, refuse to cooperate with his treating physician, and to thereafter obtain a hearing on the matter to determine whether such compensation should continue. In this particular case, however, the respondent insurer chose to invoke that privilege when the petitioner merely postponed one specific medical procedure for the clear and specific purpose of obtaining further information from his treating physician regarding risks and alternatives, which was subsequently denied him.

The petitioner submits that even though his actions in that case were indeed

justified, and said justification was repeatedly given by him, at length, to both the private respondents and the Industrial Commission, prior to the rulings there entered, that the employer/insurer and the officers of the Commission nevertheless abused the authority given them by the state, by repeatedly ignoring evidence showing justification, and insisting that the petitioner take a potentially hazardous radioactive material into his bloodstream.

"The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." Washington v. Harper, 110 S.Ct. 1028, 1041 (1990).

In their earlier pleadings, the respondent employer and insurer claimed that the petitioner suffered no violation of his right to refuse medical treatment because he was never actually forced to

take the injection he sought to avoid, and also asserted that the petitioner's only reason for bringing suit was because they had "disagreed" with him, by taking the position they did before the Commission.

The petitioner respectfully submits that a deprivation of fundamental rights does not require any forceful, physical intrusion upon a person's protected interests, but may just as well occur when one is penalized under state action or authority for asserting his lawful rights, because such rights "are protected not only from heavy-handed frontal attack, but also from being stifiled by more subtle governmental interference." Bates v. Little Rock, 361 U.S. 516, 523 (1960).

The petitioner has never stated that he is suing in federal court merely because certain parties "disagreed" with him, but asserts this cause because the actions

taken by the various respondents were plainly, and undeniably wrong; because those actions caused the petitioner and his family to suffer very serious, and quite possibly irreversible harm for which he has no other remedy, and because the particular enforcement of penalty in this case for the justifiable exercise of such a fundamental liberty flies in the face of the 14th Amendment to the U.S. Constitution, and by all rights should be redressed, to vindicate the rights of the common man, and effectively punish those who would subvert our Constitution.

"Private misuse of state statute does not describe conduct that can be attributed to state, but procedural scheme created by statute is product of state action and is thus subject to constitutional restraints and properly may be addressed in action under 1871 Civil Rights Act, if second

element of state action requirement is met as well." 42 U.S.C.A. Section 1983.

"In order to show that person has acted under color of statute, * * * it is essential that he act with knowledge of and pursuant to statute." Adickes v. S.H. Kress and Company, 90 S.Ct. 1598 (1970).

Defendant in Section 1983 claim acts under color of state law when he abuses position given to him by state. West v. Atkins, 108 S.Ct. 2250 (1988)

In their brief to the U.S. Court of Appeals the respondent employer and insurer asserted that the petitioner's case was without merit because their actions were purely private, stating that his complaint "alleges no State action on the part of (said respondents) except for their participation in procedures which they were required to follow under the Act." (Emphasis added).

But by their own admission then, these respondents were not merely invoking a presumptively valid judicial process in pursuit of only legitimate private ends, but were clearly and admittedly following a scheme of action created, and subsequently mandated by the state, with knowledge of, and pursuant to state law, by which they were actually asking the state to take action, and either coerce the petitioner into taking an intravenous radioactive injection against his will, or relieve them of their duty to compensate him, all the while knowing, or having good reason to know, that given the particular circumstances of that case, and the nature of the procedure involved, such action would either be constitutionally invalid, or work to the detriment of petitioner's fundamental rights.

And by taking such action under the

Virginia Code, the respondent employer and insurer were indeed exercising a special privilege, provided them by the state, to withold payment of a valid insurance claim, which under the same circumstances would not be possible in any other claim outside of the Virginia Workers' Compensation Act.

Though the statutory penalty imposed was initially carried out by the respondent insurer, through an action where, upon filing of a "Motion for Hearing" said motion operates as suspension of benefits in the nature of a writ of supersedeas, it was nonetheless unlawfully approved, enjoined, and further, mandated by the state officers involved under the provisions of Va. Code Sections 65.1-88 and 65.1-100.1, in a clear violation of petitioner's fundamental, as well as statutory, right to competently, and justifiably refuse medical treatment.

Petitioner again submits that this was no legitimate, private end, but one which required at least some measure of state action to achieve, and one whose only aim was to coerce him to surrender his rights against his own will and good faith judgement, or cause him to pay dearly for their exercise.

That joint action with immune state officials existed in the denial of that right should be indisputable, because there is no possible way that the petitioner could have been penalized for <u>over two years time</u> if the officers of the Industrial Commission had not unlawfully ordered it so. Following that order, the petitioner submits that the respondent insurer's action of enforcing penalty was then "clothed with the authority of law", and should therefore be considered as an action taken "under color of law".

The petitioner respectfully submits that the decision to ignore his rights, as well as the evidence and testimony he presented as justification before the Full Industrial Commission, was, intentionally or not, a joint venture, as much made by state officers as it was by the respondent insurer, since all of them were, or should have been aware that, regardless of any independent medical opinion, the petitioner was not obliged to submit to a potentially hazardous procedure which could possibly result in carcinogenesis, DNA mutations, or impairment of his reproductive capacity, especially when the injury from which he suffered was not itself life-threatening.

But by mandating that the petitioner's benefits be suspended until he "cured" his "unjustified" refusal of medical treatment, that is to say, submit to the intravenous injection of a substance shown by its

manufacturer to be attended with certain potential hazards, the state nevertheless put its own weight behind the penalty imposed upon him, and by granting and mandating such penalty in the manner and means by which it was fervently sought to be enforced, with callous disregard of the both the evidence, and the rights of the petitioner, the officers of the Commission abused their authority, and were thereby joined with the private respondents, by giving them aid and comfort in the challenged activity, while also denying the petitioner Substantive Due Process. (See: Adickes v. S.H. Kress and Company, 90 S.Ct. 1598 (1970); Cruzan v. Director, Missouri Dept. of Health, 110 S.Ct. 2841 (1990); Jackson v. Metropolitan Edison Company, 95 S.Ct. 449 (1974); Lugar v. Edmonson Oil Co., Inc., 102 S.Ct. 2744 (1982); Monroe v. Pape, 81 S.Ct. 473 (1961); United States v.

Price, 86 S.Ct. 1152 (1966)).

It is a well established doctrine of law that people are more valuable than money. For the officers of the Industrial Commission of Virginia to have decided to place the monetary interests of the respondent insurer on a higher priority than the petitioner's own fundamental rights was to not only to deny this basic doctrine, but in so doing grant unjust enrichment to the respondent insurer at the petitioner's expense, while at the same time burdening him with the enormously difficult task of securing reversal of that unlawful decision, and cause him, as well as his family, to suffer additional harm.

In all of these respects, the petitioner submits that the employer, insurer, and the officers of the Industrial Commission of Virginia jointly participated in the challenged activity of imposing

penalty upon him for no other cause than the fact that he exercised, in good faith, his constitutionally protected right to refuse only one specific medical procedure.

As the conduct for which the petitioner was penalized is freely exercised and enjoyed by the overwhelming balance of the population of this country, he has also claimed a similar, and concurrent deprivation of his right to equal protection of the law, which is an additional interest protected by the 14th Amendment to the U.S. Constitution. In regard to this issue, it is submitted that if a claimant for Workers' Compensation benefits shares with the general population <u>any</u> right whatsoever to be free from unwanted medical care, he should certainly have the right to refuse one specific medical procedure for specific and valid reasons, without being penalized for doing

so. Accordingly, the petitioner has held in his pleadings that the penalty imposed upon him was therefore unlawful, in that it was enforced by the state in violation of the "supreme Law of the Land." U.S. Const. Art. VI; U.S. Const. Amend. 14.

At the May 16, 1991 hearing, the District Judge told the petitioner that his only remedy had already been granted him in the state courts upon the restoration of his appealed award, and that he was not entitled to any additional relief. The respondent employer and insurer also stated in their brief to the U.S. Court of Appeals that "this claim is very unusual because the plaintiff has not only availed himself of his compensation remedy but has prevailed."

The petitioner respectfully submits that the fact that he availed himself of his state remedy by sucessfully challenging

the sufficiency of the evidence before the Industrial Commission of Virginia does not preclude a claim arising under 42 U.S.C.A. Section 1983, since the intent Congress had in mind while adopting this statute was to protect individual rights by providing a supplemental, and independent avenue of redress for their unlawful deprivation by persons purporting to act pursuant to state law, or with the power of the state behind them. 42 U.S.C.A. Sec. 1983.

Therefore, the petitioner submits that on this point alone the decision rendered by the District Court is grossly in error, for it frustrates the intent of Congress.

The petitioner also submits that the fact that he finally obtained a reversal of the rulings of the Industrial Commission of Virginia only proves that his refusal of the specific treatment in question had always been justified, regardless of any

prior holding to the contrary by the Industrial Commission. That the Virginia Court of Appeals reversed the unfounded rulings of the Industrial Commission does not alter the fact that those rulings deprived the petitioner of his rights, because the final ruling of the Commission plainly stated that the petitioner had no independent right to refuse medical care outside the authority of medical opinion, or that of the Industrial Commission itself. This was clearly in violation of the 14th Amendment to the United States Constitution, and deserves redress.

As regards the respondent physician, Dr. Dillon, the petitioner submits that as a member of the medical profession, this physician had good reason to know of petitioner's fundamental right to refuse medical treatment, and of the legal doctrine of informed consent. It is also

submitted that since he was knowingly treating the petitioner under the provisions of the Virginia Workers' Compensation Act, he also had reason to know that any statement given by him that would cast any doubt upon the petitioner's willingness to cooperate with his physician would inevitably cause him to be penalized in one way or another.

That this physician issued a grossly misleading, if not fraudulent, statement regarding the behavior of the petitioner directly to "Workmen's Compensation", in care of the respondent insurer, after refusing to consult the petitioner as petitioner requested, and subsequently refused to communicate with the petitioner in any way, or offer any timely statement in support of petitioner's rights, this physician appeared to purposely invoke the actions of the state against him, perhaps

as punishment for not blindly following the order to undergo the procedure in question.

In these ways the petitioner submits that this physician did not only betray his fiduciary duty to act in his patient's best interests, which violates an implied contract which is entered into, and exists between all physicians and the patients they treat, but also willingly involved himself in the chain of events that led to, and finally caused the deprivation of petitioner's fundamental rights.

The petitioner also submits that as he was bound by state law to accept Dr. Dillon's services, and not free to choose another on his own, this physician was performing a function very similar to that of a physician who treats state prisoners, and in that capacity may be fairly said to have "acted under color of state law" for the purpose of this suit. (See: West v.

Atkins, 108 S.Ct. 2250 (1988)).

Most of the foregoing arguments, along with others not included here were clearly presented to the District Court in the petitioner's earlier pleadings, and answers to the various respondents' Motions to Dismiss, and again before the U.S. Court of Appeals. As the federal statute relied upon requires only that a complainant merely allege an unlawful violation of a constitutionally protected interest under the terms of that statute in order to recieve a fair trial on the merits, the petitioner submits that he has more than met that requirement. He respectfully submits that the dismissal of his claim by the District Court was therefore a grossly unfair, and capricious exercise of judicial discretion, which, if upheld, leaves him no remedy whatsoever for the gross injustice he and his family were forced to endure.

CONCLUSION

Liberty means nothing when one is penalized for asserting it. To say on the one hand that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatments, and then on the other disallow him the right to redress its unlawful denial is clearly non sequitur.

The recognition that claimants for Workers' Compensation do indeed share this fundamental liberty interest with the balance of the population has long been a part of every Workers' Compensation scheme, and is well borne out by legal precedent. Every state has in their relevant statutes a provision for the justifiable refusal of medical treatments, and claimants should be allowed to sue when they are unjustly penalized for exercising that right, and thus deprived of their fundamental liberty.

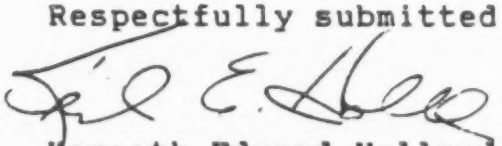
To allow this could do no harm to the efficient administration of any Workers' Compensation laws. On the contrary, it could only serve to provide those who are already suffering the pains of disablement with some measure of personal dignity, and protection from mistreatment by the unscrupulous, and insure that those who refuse medical treatments in good faith are not subjected to unjust termination of sorely needed compensation benefits.

In light of the foregoing, it should be clear to this Court that the decisions here appealed are indeed in error, and that a Writ of Certiorari should be granted, because this petition presents an issue resolved through implication by this Court, but not specifically and unequivocally decided by this Court, and the decisions below are in conflict, by implication, with previous, and recent decisions of this Most

Honorable Court.

WHEREFORE, and based upon the foregoing, the petitioner hereby prays that the U.S. Supreme Court will consider the injustice that has been done to him, grant this Petition for Writ of Certiorari, and subsequently reverse the decisions of the courts below.

Respectfully submitted,



Kenneth Edward Holland

APPENDIX

EXHIBIT 1	U.S. District Court Order Signed 04/22/91
EXHIBIT 2	U.S. District Court Order Signed 05/16/91
EXHIBIT 3	U.S. Court of Appeals, Fourth Circuit, Unpublished Per Curiam Opinion Entered 02/21/92
EXHIBIT 4	U.S. Court of Appeals, Fourth Circuit, Order Entered 03/20/92
EXHIBIT 5	Industrial Commission of Virginia, Opinion by O'NEILL, Chairman Entered 01/31/89
EXHIBIT 6	Court of Appeals of Virginia, Published Opinion Entered 08/14/90

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

KENNETH EDWARD HOLLAND,

Plaintiff,

v. CIVIL ACTION
NO. 91-67-N

THE COMMONWEALTH OF VIRGINIA, THE INDUSTRIAL COMMISSION OF VIRGINIA, VIRGINIA BRIDGE AND STRUCTURES, INC., LIBERTY MUTUAL INSURANCE COMPANY, and JAMES D. DILLON, M.D., COMMONWEALTH NEUROSURGERY, LTD.,

Defendants.

ORDER

The Court will consider today the Motions to Dismiss of the Commonwealth of Virginia and the Industrial Commission of Virginia.

Plaintiff's Complaint at page 4, paragraph 1 clearly indicates that his case against the Commonwealth of Virginia is in fact a case against the Court of Appeals of Virginia and the Supreme Court of Virginia.

EXHIBIT 1

The plaintiff is barred from suing the Commonwealth of Virginia by the eleventh amendment to the United States Constitution.

Additionally, from the factual recount in the file, all the activities of the Supreme Court of Virginia and the Court of Appeals of Virginia were within the judicial functions of those bodies and the members of each of those courts have judicial immunity. The same is true of the Industrial Commission of Virginia.

Furthermore, the plaintiff seeks to proceed under 42 U.S.C. Section 1983. Neither the Industrial Commission of Virginia nor the Commonwealth of Virginia nor the Supreme Court of Virginia nor the Court of Appeals of Virginia are persons as set forth in the section of the Code relied upon.

For these reasons, the plaintiff's action against the Commonwealth of Virginia and the Industrial Commission of Virginia are DISMISSED with prejudice.

The docket clerk is instructed to set the Motions to Dismiss of Virginia Bridge and Structures, Inc., Liberty Mutual Insurance Company and James D. Dillon, M.D. for a hearing. The Court shall also at that time hear the Motion for Sanctions of James D. Dillon, M.D. At the hearing, the Court may render its decision from the bench and therefore defendant Dillon should be prepared to present evidence or argument concerning the requested sanctions. It is not to be implied that the Court has ruled upon the question of sanctions.

The Clerk is DIRECTED to send a copy of this Order to plaintiff and counsel for the defendants.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke
United States District
Judge

Norfolk, Virginia
April 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

KENNETH EDWARD HOLLAND,

Plaintiff,

v. CIVIL ACTION
NO. 91-67-N

VIRGINIA BRIDGE AND
STRUCTURES, INC., et al.,

Defendants.

ORDER

This matter came before the Court today on the Motions to Dismiss of Virginia Bridge and Structures, Inc., Liberty Mutual Insurance Company, and James D. Dillon, M.D., pursuant to Rules 12(b)(1) and 12(b)(6).

Upon review of the file, the briefs and hearing oral argument, the Court has determined that there has been no violation by the defendants of any constitutionally protected rights of the plaintiff.

EXHIBIT 2

Additionally, there was no state action in the plaintiff's claim against Dr. Dillon. Following the Court's decision to dismiss the case, at the urging of the Court, Dr. Dillon withdrew his Motion for Sanctions.

This action is DISMISSED with prejudice.

The Clerk is DIRECTED to send a copy of this Order to plaintiff and to counsel for the defendants.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke
United States District Judge

Norfolk, Virginia
May 16, 1991

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KENNETH EDWARD HOLLAND,
Plaintiff-Appellant,

v.

COMMONWEALTH OF VIRGINIA; INDUSTRIAL COMMISSION OF VIRGINIA; VIRGINIA BRIDGE AND STRUCTURES, INCORPORATED; LIBERTY MUTUAL INSURANCE COMPANY; JAMES D. DILLON, M.D.,
Defendants-Appellees.

No. 91-2128

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
J. Calvitt Clarke, Jr., Senior District Judge.
(CA-91-67-N)

Submitted: January 17, 1992

Decided: February 21, 1992

Before WIDENER, PHILLIPS, and WILKINS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Kenneth Edward Holland, Appellant Pro Se. Teresa Diane Creef, Assistant Attorney General, Patrick R. Bynum, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia; Alan

Brody Rashkind, FURNISS, DAVIS, RASHKIND & SAUNDERS, P.C., Norfolk, Virginia; Robert William Hardy, KNIGHT, DUDLEY, DEZERN & CLARKE, Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Kenneth Edward Holland appeals from the district court's order denying relief under 42 U.S.C. § 1983 (1988). Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. *Holland v. Commonwealth of Virginia*, No. CA-91-67-N (Apr. 23 and May 16, 1991). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 20, 1992

No. 91-67-N

KENNETH EDWARD HOLLAND,

Plaintiff - Appellant

v.

THE COMMONWEALTH OF VIRGINIA; INDUSTRIAL COMMISSION OF VIRGINIA; VIRGINIA BRIDGE AND STRUCTURES, INCORPORATED; LIBERTY MUTUAL INSURANCE COMPANY; JAMES D. DILLON, M.D.

Defendants - Appellees

O R D E R

The appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

UJOHN M. GREACEN
CLERK

EXHIBIT 4

VIRGINIA:
IN THE INDUSTRIAL COMMISSION

JAN 31 1989
Opinion by O'NEILL
Chairman

KENNETH HOLLAND, Claimant

v.

VIRGINIA BRIDGE & STRUCTURES,INC., Employer
LIBERTY MUTUAL INSURANCE COMPANY, Insurer

Claimant is pro se.

Robert A. Rapaport, Esquire
P.O. Box 3188
Norfolk, Virginia 23514-3188
for the Defendants.

REVIEW on the record before the Full Commission at Richmond.

The claimant requests review of the opinion of the Deputy Commissioner dated October 21, 1988, which suspended compensation and medical benefits as of July 21, 1988, and ordered that benefits shall remain suspended until modified by further order on the ground that the claimant unjustifiably refused reasonable and necessary medical treatment.

EXHIBIT 5

The claimant sustained an industrial accident while employed as a construction worker by Virginia Bridge and Structures, Inc. when he fell backward from a scaffold which had collapsed. The accident occurred on March 25, 1988. An award was entered providing compensation at the rate of $266.67 per week during incapacity and commencing April 04, 1988. Magnetic Resonance Imaging (MRI) performed on April 20, 1988 at the request of the treating physician, Dr. Morina, revealed specific findings in the claimant's low back at L4-5 and L5-S1. The claimant continued to complain of back stiffness and weakness in his legs and he was referred for neurosurgical evaluation by James Dillon, M.D.

The opinion of the Deputy Commissioner reports in pertinent detail the findings of the various physician who treated the

claimant, including the findings of Dr. Dillon, neurosurgeon, who scheduled a specific series of x-rays and a bone scan on June 9, 1988. The radiology recommended was performed and the radiology report by James Bosworth, M.D. indicated the possibility of infection or a possible metastatic focus on the vertebral body at L2. Dr. Bosworth also recommended a bone scan to determine whether the lesion noted is active or static.

The claimant refused to undergo the bone scan which had been recommended and scheduled by Dr. Dillon and also recommended by Dr. Bosworth. Dr. Dillon reported on June 15, 1988 that due to the claimant's refusal of the bone scan there was no further neurosurgical workup which could be performed for the claimant and the claimant was referred back to Dr. Morina.

Dr. Morina reported that the claimant

was essentially unchanged as of July 11, 1988, and stated that the claimant would be returned to light duty after one additional week.

On the basis of Dr. Dillon's report of June 15, 1988, which indicated refusal of the recommended bone scan, the employer's insurance carrier applied for hearing and paid compensation through July 21, 1988.

At hearing before the Deputy Commissioner on October 4, 1988, it was agreed by the parties that no testimony was to be given and the parties relied upon the record and the documents submitted. The claimant, who appeared pro se, submitted reports, letters and documents. The employer acknowledged that the claimant remained disabled, but relied upon suspension of compensation as being in accord with the statute in view of unjustifiable refusal of a necessary

medical service (Code Section 65.1-88).

We have reviewed the documentary evidence and the medical reports in their entirety and we find that the claimant has unjustifiably refused medical service and that the employer is entitled to suspension of compensation as of July 21, 1988 under the provisions of Code Section 65.1-88.

The claimant contends that he is justified in that the bone scan examination refused by the claimant involves intravenous injection "of a relatively untested radioactive agent and shows a blatant, and total disregard of my basic legal rights."

We find upon review of the evidence that the claimant indeed has a right to refuse medical service under the Act. We also find that if such refusal is found to be unjustified refusal of reasonable and necessary medical service, the employer is

entitled, by statute, to the suspension of payment for both medical services and compensation benefits for so long as refusal continues (Code Section 65.1-88). Such is the case here. The thrust of the claimant's argument in stating that his refusal of the bone scan is justified is that the claimant has a right to choose medical treatment "in a manner in which he would normally act if he were paying for his medical care himself." (Claimant's request for Review dated November 9, 1988).

The General Assembly, in the Virginia Workers' Compensation Act, has effected a compromise in which employers and employees have defined statutory rights. One of the rights prescribed by the General Assembly is the right of the employer to see to appropriate medical care for workers who are injured in the employment. We see this provision as one which protects both

employer and employee. In this case the treating physician, Dr. Dillon, and Dr. Bosworth directed specific medical attention for the claimant. Radiological studies examined by Dr. Bosworth detected a specific lesion which, based on medical opinion, deserved further necessary examination by bone scan. Bone scan is a regularly- used medical procedure which, in this case, was recommended for specific and clearly appropriate purpose. In the absence of reasonable medical opinion which would justify refusal by the claimant of this medical procedure, we find that the claimant's refusal of the recommended test was unjustified.

We note specifically that the Deputy Commissioner has detailed the medical evidence in his opinion and we adopt that opinion, including the findings of fact and conclusions of law, in its entirety. The

opinion of the Deputy Commissioner is AFFIRMED.

We advise the claimant that he is entitled by statute to resumption of all benefits to which he may be eligible under the Workers' Compensation Act if he cures his unjustified refusal of the necessary medical service prescribed.

This case is ordered removed from the Review Docket.

VIRGINIA:
IN THE COURT OF APPEALS

KENNETH EDWARD HOLLAND

V.

VIRGINIA BRIDGE & STRUCTURES,INC., AND
LIBERTY MUTUAL INSURANCE COMPANY

Record No. 0250-89-1

August 14, 1990

Kenneth Edward Holland, pro se.

Robert A. Rapaport (Fay F. Spence, Knight, Dudley, Pincus, Dezern & Clarke, Norfolk, on brief), for appellees.

Present: BAKER, BARROW and WILLIS, JJ.

WILLIS, Judge.

In this appeal, we hold that the Industrial Commission erred in suspending an award of workers' compensation benefits based on its finding that the claimant unjustifiably refused reasonable and necessary medical treatment.

EXHIBIT 6

On March 25, 1988, Kenneth Holland, employed as a construction worker by Virginia Bridge and Structures, Inc., was injured when a scaffold on which he was working collapsed. An award was entered in his favor providing compensation during incapacity, commencing April 4, 1988.

Holland's attending physician, Dr. John Morina, referred him to Dr. James Dillon, a neurosurgeon, for examination to determine the cause of his continuing back symptoms. Following an examination performed on May 25, 1988, Dr. Dillon recommended that Holland submit to a bone scan, which involved the injection of a radioactive isotope, to be performed on June 9, 1988. Holland was given an appointment to return to Dr. Dillon on June 15.

On June 9, before submitting to the bone scan, Holland requested and obtained

from the medical technologist who was to administer the test a manufacturer's printed description of the radio opaque isotope with which he was to be injected. This literature set forth warnings and disclaimers which alarmed him. He testified that the technologist agreed with his concern. He decided to defer submitting to the bone scan until he could talk further with Dr. Dillon. He called Dr. Dillon's office, and spoke with the secretary who expressed sympathy with his position and told him that they would contact him later that day. This was not done. On June 15, Dr. Dillon's office called Holland and told him that his appointment was cancelled and that they were referring him back to Dr. Morina because of his refusal to submit to the bone scan.

On July 21, 1988, the employer and its insurance carrier applied to the Industrial Commission for an order suspending Holland's benefits on the ground that he had unjustifiably refused reasonable and necessary medical treatment. Code Section 65.1-88(B) states, "The unjustified refusal of the employee to accept ... medical service ... when provided by the employer shall bar the employee from further compensation." Evidence was taken before a deputy commissioner who found that the bone scan recommended by Dr. Dillon was a routine diagnostic test, that its dangers were extremely slight, that Dr. Dillon's recommendation was reasonable and was intended to help identify the cause of the claimant's disability, and that the claimant's concerns were exaggerated and unreasonable and did not warrant his refusal to undergo the prescribed testing.

The deputy commissioner ordered the suspension of benefits as of July 21, 1988. On review, the full commission adopted the findings and conclusions of the deputy commissioner and affirmed his order.

The commission's finding that the bone scan prescribed for Holland was medically justified is supported by the evidence. The expert medical evidence was unanimous on that point. However, that is not the end of the inquiry. The question is not whether the recommended procedure was justified, but whether the patient's refusal to submit to it was justified. The matter of justification must be considered from the viewpoint of the patient and in light of the information which was available to him. *R.G. Moore Bldg. Corp. v. Mullins*, 10 Va.App. ___, ___, 390 S.E.2d 788, ___ (1990).

The manufacturer's printed warning, which Holland read, set forth precautions to be followed to minimize radiation exposure to patients, stated that long term studies had not been performed to evaluate carcinogenic potential or possible effects on fertility and reproductive capacity, and stated that particular care should be taken with respect to patients having certain medical conditions. He expressed concern over this, and his concern was supported by the medical technologist. Given these facts, we find that his decision not to submit to the injection without further medical consultation and assurance was both reasonable and justified. He sought such further consultation from Dr. Dillon, but was unable to obtain it.

The purpose of Code Section 65.1-88(B) "is to place the cost of medical care on the employer and to restore the employee's

good health" so that he may return to work. *Richmond Memorial Hosp. v. Allen*, 3 Va.App. 314, 318, 349 S.E.2d 419, 422 (1986) (citation ommitted). It penalizes an employee "who unjustifiably refuse(s) reasonable and necessary medical treatment." *Davis v. Brown & Williamson Tobacco Co.*, 3 Va.App. 123, 127, 348 S.E.2d 420, 421 (1986). However, the treating physician must deal with the employee as he would any other patient and cannot simply prescribe treatment without providing an adequate explanation of the associated benefits and/or risks. The claimant may not be treated as an inanimate object, devoid of sensibility and concern for his welfare.

We hold that Holland's refusal to submit to the bone scan was justified under the circumstances which controlled that decision. Accordingly, the judgement of

the Industrial Commission is reversed, and it is ordered that Holland's benefits be reinstated effective July 21, 1988.

Reversed and remanded.